Jewel Bakery, Inc. *and* Darryl Spiller. Case 7–CA–19964

29 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 26 January 1983 Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Darryl Spiller at the insistence of the Union and because he had sought to become a member of the Union and had visited the Union's offices. The judge also concluded that the Respondent violated Section 8(a)(1) of the Act by telling Darryl Spiller that he was being discharged at the insistence of the Union and because he had visited the Union's offices.

In reaching his factual findings, the judge relied entirely on the testimony of Spiller and his mother, which he credited on the basis of their demeanor. The Respondent disputes, inter alia, the judge's credibility resolutions. It argues that the judge erred in failing to describe and rely on the testimony of its witnesses. We find merit in the Respondent's exceptions.

The facts, as found by the judge, are as follows. Spiller was employed by the Respondent as a bakers' helper from July 1981 until his termination 19 October 1981. He was not represented by the Union.[1] On becoming interested in obtaining union membership, Spiller, on Friday, 16 October 1981, went to the Union's offices, spoke to a union official named Levin, told Levin he worked for Jewel Bakery, and expressed interest in obtaining union membership. Levin asked why Spiller wanted union membership and who had sent him to the union office. Levin said that he could not presently respond but that he would be talking to the Respondent and would thereafter contact Spiller. Spiller was scheduled to work an evening shift on Sunday, 18 October. The morning of 18 October, according to the credited testimony, Spiller's mother called the Company and told Company President Erno Klein that Spiller had been ill the previous night and would be "going to the hospital." Spiller did not report for work as scheduled. On that date, he visited two hospitals because of an undisclosed illness.

The judge credited Spiller's testimony that he called Klein on Monday, 19 October, and told him that he would be coming to work. He also credited Spiller's account of the conversation, which he described as follows: Klein told him not to report because Levin, the union official, had told Klein not to permit Spiller to work. Spiller asked Klein if he was losing his job because he had gone to the Union about himself and Klein said, "Yeah." Spiller asked if there was any way he could obtain reinstatement. Klein answered that the Respondent could not employ Spiller because of the insistence of the Union.

In reaching his view of the facts, the judge discredited all of the testimony of the Respondent's witnesses[2] concerning the circumstances leading to Spiller's discharge. He did not describe or analyze their testimony. He simply found that they gave conflicting accounts of the discharge and that Klein made a "hastily and crudely contrived attempt to repudiate his earlier admission in a pretrial affidavit that it was he who had discharged . . . Spiller." In contrast, the judge stated his impression that Spiller and his mother were candid witnesses.

Relying on the credited testimony, the judge proceeded to find that the Union "caused [Respondent] to terminate Spiller because he displeased the Union's business agent" and that "[s]uch displeasure arose from Spiller's visit to the Union's office in an effort to learn the qualifications for Union membership." He continued by stating that "the interference [presumably the Union's interference] with Spiller's employment did not arise from 'a valid union security clause' nor from facts showing 'that the union action was necessary to the effective performance of its function of representing its constituency.'" He thereupon concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Spiller "in these circumstances"; he further concluded that

[1] The record reflects that the Respondent was party to a collective-bargaining agreement with Local 78, Bakery, Confectionery and Tobacco Workers. While there was testimony that Spiller, as well as some other employees, was not "in" the Union and did not receive contract wages, the record does not reflect the unit description or indicate whether the contract contains a union-security clause.

[2] The witnesses were the Respondent's president, Klein; co-owner, Maznu Chowdhury; and Arthur Spiller, an admitted supervisor and Spiller's uncle.

Klein's 19 October statements to Spiller interfered with Spiller's Section 7 rights in violation of Section 8(a)(1) of the Act.

As stated above, the violations found by the judge rest solely on credibility resolutions which, in turn, arise from his demeanor observations and his evaluation of the consistency of the testimony of the Respondent's witnesses. The pivotal piece of evidence in the judge's analysis is Spiller's testimony about his 19 October discharge conversation with Klein. Absent this testimony, the judge describes no other evidence sufficient to support his findings.

In reviewing this record we have been mindful of the Board's established policy against overruling an administrative law judge's credibility resolutions unless a clear preponderance of *all* the relevant evidence convinces us that they are incorrect.[3] The rationale for this policy is that the administrative law judge and not the Board has the advantage of observing the witnesses as they testify. Accordingly, the Board has traditionally accorded "great weight" to credibility resolutions based on demeanor.[4] We have also been mindful, however, that in enunciating the *Standard Dry Wall* policy the Board did not cede its statutory "power and responsibility of determining the facts as revealed by the preponderance of the evidence."[5] Rather, as the Board explicitly stated, in all cases coming before it for review on exceptions, it would base its "findings as to the facts upon a *de novo* review of the entire record, and [did] not deem [itself] bound by the [administrative law judge's] findings."[6] Since the enunciation of the policy, the Board has repeatedly stated that the "ultimate choice between conflicting testimony rests not only on the witnesses' demeanor, but also on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole."[7]

The Board has not applied its *Standard Dry Wall* policy so as to make inviolable an administrative law judge's credibility resolutions, including those based on demeanor. In cases in which the excepted-to credibility resolutions are in decisions which have omitted reference to relevant testimony on critical matters and have mistakenly characterized the state of the record, the Board has accorded less weight to the factor of demeanor.[8] Thus, the invocation of the demeanor factor is not a substitute for a complete review and analysis of all the record evidence.

In this case, the judge's decision omitted reference to relevant testimony on critical matters; and no reasons were set forth for ignoring such testimony. Further, conclusions were based on testimony which was not placed within context. And, finally, the decision contained statements and findings unsupported by the record evidence.

We note particularly that the judge omitted all reference to Spiller's employment history with the Respondent other than his July 1981 hire date and his 19 October 1981 final discharge date. Spiller's own testimony, which is corroborated by the Respondent's witnesses, reveals a history of absenteeism and discipline during his short tenure. Specifically, Spiller was first twice warned about lateness or absenteeism without calling in. He was then discharged, in August, for another incident of absenteeism; and, he was subsequently reinstated from that discharge with the understanding that, for any further misconduct of the same nature, he would be discharged and never rehired. These facts substantiate the Respondent's defense—that Spiller was discharged for yet another instance of absenteeism. Conversely, the failure to consider these facts serves to cast doubt on the blanket discrediting of the Respondent's witnesses' testimony[9] re-

[3] *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

[4] Id. at 545.

[5] Id. at 544–545.

[6] Id. at 545.

[7] *Humes Electric*, 263 NLRB 1238 (1982); *V & W Castings*, 231 NLRB 912 (1977), enfd. 587 F.2d 1005 (9th Cir. 1978); *Northridge Knitting Mills*, 223 NLRB 230 (1976).

[8] See, e.g., *Bralco Metals*, 227 NLRB 973 (1977); *Carlton Paper Corp.*, 173 NLRB 153 (1968).

[9] We also do not agree with the judge's characterizations of the testimony of Respondent's witnesses. As described above, he found that Klein made a "crudely contrived attempt to repudiate his earlier admission in a pretrial affidavit" and also found that the Respondent's three witnesses gave "conflicting accounts" of the discharge.

With respect to Klein's testimony, we note that, after his denial of having notified Spiller of the discharge, Klein acknowledged having stated in his affidavit that "he discharged Darryl Spiller because of unreliability as an employee." Klein subsequently explained this statement as meaning that another individual told Spiller of his discharge but that Klein took responsibility for the discharge. This explanation is eminently plausible. Further, Klein's explanation is consistent with his stated assumption of broad responsibility in the affidavit (for example Klein stated in his affidavit that he "hired and employed" Spiller while the record indicates that Spiller's uncle actually notified Spiller of his hire).

With respect to the testimony of the Respondent's three witnesses about the discharge, we again emphasize that the judge labeled it "conflicting" but failed to specifically describe and analyze such testimony. While we recognize some minor inconsistencies among the testimony of the three witnesses, such inconsistencies are not significant. One example is that Chowdhury asserted he discussed Spiller's absence with Klein by phone on Sunday night while Klein recalled the discussion occurring in person on Monday. Also, it is not significant that both Chowdhury and Spiller's uncle claimed to have discharged Spiller, since both acknowledged that Chowdhury sent Spiller home on 19 October and it is undisputed that the uncle explained to Spiller the reason for the discharge the following day. Rather, the testimony of the Respondent's witnesses, infra, at fn. 10, yields a consistent sequential description of how Spiller came to be discharged and notified of the discharge as well as a consistent explanation for why he was discharged.

garding the events leading to the Spiller discharge.[10]

The judge also omitted reference to evidence and circumstances that call into question the likelihood of Spiller's version of the purported 19 October conversation with Klein. Spiller's version, as set forth by the judge, has Klein attributing Spiller's discharge to both Spillers having gone to the Union and the Union's insistence.[11] First, however, the judge failed to describe how Spiller came to visit the Union's office. The record reflects that Spiller was referred to the Union by his supervisor who told him the location of the office and the name of the business agent. Such evidence indicates an absence of antiunion motivation on the Respondent's part. Second, the judge failed to point out that the record is devoid of evidence that would lend credence to union animus on the Respondent's part as described in Spiller's version of the purported 19 October conversation. There is no evidence of any other antiunion statements by the Respondent.[12] The Respondent enjoyed a collective-bargaining relationship with the Union that was not shown to be marked by any discord. And there is no evidence showing that the Respondent's employment of employees who were not members of the Union and not paid the contract rates was a point of contention between the Respondent and the Union. Third the judge similarly failed to point out that there is no evidence that would lend credence to the Union's seeking Spiller's discharge. Aside from the claimed admission by Klein in the purported 19 October conversation, there is no direct evidence that the Union contacted Klein before Spiller's discharge and there is no direct evidence that the Union sought Spiller's discharge.[13] The record does not demonstrate any union motive that would have led it to seek Spiller's discharge. Contrary to the findings of the judge, the evidence does not show that the Union was motivated to take any action "because [Spiller] displeased the Union's business agent" as a result of his visit to the Union's office to learn the qualifications for union membership. Evidence of the Union's response to Spiller's visit is derived from Spiller's testimony. There is nothing in Spiller's description of that 16 October visit to indicate that the union representative was "displeased." To the contrary, the union representative appears to have discussed with Spiller the qualifications for becoming a master baker and simply to have told Spiller that he could not immediately respond and would contact Spiller in the future.

Finally, the judge failed to describe some of the dialogue which Spiller testified occurred during the purported 19 October conversation with Klein. At the end of the conversation, after assertedly having been told that there was no way he could get his job back because of the Union's insistence, Spiller testified he asked Klein how he could get in the Union. According to Spiller, Klein responded that, if Spiller got his job back, he could get in the Union. Spiller also testified that "it all—it sounded kind of confusing" and so he "later" called his uncle. Such testimony indeed sounds confusing. Yet the internal ambiguity and Spiller's own admitted confusion about the purported conversation were not examined in the decision nor were they made an apparent part of the judge's credibility determination.[14]

Accordingly, we find that the judge's failure to explicitly review and give due consideration to all the relevant evidence taints his credibility resolu-

[10] The following is a description of the composite testimony of the three witnesses concerning the discharge events. On the evening of 18 October, after Spiller failed to arrive for his shift, Chowdhury, who was in charge during that shift, called Spiller's uncle. Spiller's uncle had previously argued for Spiller's past reinstatement by promising to substitute or find a replacement if Spiller missed another shift. During their conversation, Spiller's uncle gave Chowdhury excuses for not coming in to work himself and offered to try to find a replacement, but Chowdhury said he would find a replacement. Chowdhury then filled in on Spiller's job until he obtained a replacement that evening. Either that evening or the following morning, Chowdhury discussed Spiller's absence with Klein and they agreed to discharge Spiller because of the absence. On Monday, 19 October, Klein discussed Spiller's absence and the intended discharge with Spiller's uncle. That evening, when Spiller came to work, Chowdhury sent him home, saying he had had his last chance. On Tuesday, Spiller called Klein, who in turn referred Spiller to his uncle for an explanation of why he was sent home. Spiller then called his uncle and asked why he was sent home and was again told he had had his last chance. All three witnesses attributed Spiller's discharge to his absence.

[11] We note that Klein denied the substance of the 19 October conversation with Spiller, as well as the fact that it occurred at all.

[12] While there are two references in the record to statements attributable to the Respondent concerning Spiller and the Union, neither of those was relied on, or even discussed, by the judge. We do not find that either of the statements reflects union animus on the Respondent's part. Thus, one statement, as testified to by Spiller's mother, has Spiller's uncle stating, several days after the discharge, that the uncle would have gotten Spiller into the Union but Spiller was hardheaded and went to the Union himself. We note that the testimony of Spiller's mothers leaves unclear the sequential flow of her conversation with the uncle and the question of who raised the subject of the Union. The second reference is contained in the Respondent's response to Spiller's unemployment compensation claim. After stating the reason for the discharge, and in response to alleged "claimant" statements about the Union's refusing membership to Spiller, the Respondent stated that, "He seems to have goten [sic] the idea that if he was a member of the Union, he could not be fired. The union refused to member him because he was not qualified. Even if Spiller had been a union member, he would have been fired."

[13] Klein denied that he spoke to the Union about Spiller.

[14] There were also internal inconsistencies in Spiller's testimony that were left apparently unexamined by the judge. Spiller first testified that he called in to the Company on Sunday, 18 October, but later testified that his mother called on his behalf. Also, at first Spiller was not sure whether Klein mentioned the name of the Union's business representative during the purported 19 October conversation, while in subsequent testimony he asserted unequivocally that Klein referred to the union representative by name. Further, Spiller first denied that the union representative told him the qualifications for becoming a master baker whereas he later claimed that the union representative did tell him such qualifications.

tions. Our review of all the relevant evidence convinces us that the judge's credibility resolutions, at least with respect to the crediting of Spiller's testimony about the purported 19 October conversation with Klein and the discrediting of the Respondent's witnesses as to the reasons for Spiller's discharge, are incorrect.

As discussed above, there is direct evidence which supports a probability that the purported 19 October conversation with Klein occurred as Spiller testified. In contrast, there is evidence to support the Respondent's account of its own motivation. It is undisputed that at the time of his discharge Spiller was working under "last chance" conditions resulting from prior absences and lateness. On 18 October, Spiller was once again absent and the Respondent's co-owner, Chowdhury, obtained a replacement for Spiller during that shift. There is no evidence, however, that the Respondent planned Spiller's replacement before that evening or that the decision to bring in the replacement was prompted by anything other than Spiller's absence. Spiller's absence preceded his discharge by 1 day. Following Spiller's discharge, Spiller called his uncle and, according to the uncle's unrefuted testimony, the uncle informed Spiller that a replacement had been hired because Spiller had not shown up and that Spiller had had his last chance as he had been warned.

Thus, in view of the strength of the evidence underpinning the Respondent's account of its actions and the related probability that the events occurred as asserted by the Respondent rather than by Spiller, we are unable to credit Spiller's version of his discharge, in general, and of the purported 19 October conversation with Klein, in particular.[15] Since the remaining evidence is insufficient to support the complaint allegations, we find that the General Counsel has failed to prove the 8(a)(3) and (1) complaint allegations and we shall dismiss the complaint in its entirety.[16]

[15] We note the remaining testimonial conflict between Spiller's mother and Erno Klein. Spiller's mother testified that she called the bakery the morning of 18 October and notified an unidentified man with an accent that Spiller would be absent that evening; at the hearing, she testified that the accent of the man she heard that Sunday sounded like Klein's accent, which she heard when Klein testified. Klein denied speaking to anyone about Spiller that day. We find it unnecessary to resolve this conflict since neither version would alter our view of Spiller's testimony about his discharge.

[16] Member Hunter agrees that the General Counsel failed to sustain his burden of proof in this case. He would find that even assuming that the Respondent stated that it was firing Spiller because he went to the Union, as credited by the judge, the Respondent has shown that the discharge was also because of Spiller's absenteeism. Examining the Respondent's dual motive, Member Hunter finds that the Respondent has shown that, even if Spiller had not gone to the Union, the Respondent would have discharged him for his intervening absence on 18 October.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge: This matter was heard by me on October 21 and 22, 1982, at Detroit, Michigan, upon a charge filed on October 26, 1981, by Darryl Spiller, an individual, and upon a complaint issued by the Regional Director for Region 7 of the National Labor Relations Board on December 4, which was amended by counsel for the General Counsel at the hearing. The amended complaint alleged that Jewel Bakery, Inc., the Company, by its agent Erno Klein, violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §151, et seq.), referred to below as the Act, by discharging Spiller because he had sought membership in Local 78, Bakery, Confectionary and Tobacco Workers, AFL-CIO, the Union, at the Union's insistence, and because Spiller had visited the Union's offices. The Company denied commission of the alleged unfair labor practices.

On the entire record in this case, including my observation of the witnesses and their demeanor, and after due consideration of the oral arguments of counsel for the General Counsel and the Company's counsel at the conclusion of the hearing, I make the following

FINDINGS OF FACT

I. THE COMPANY'S BUSINESS

The Company, a Michigan corporation with its principal office and place of business at Southfield, Michigan, is engaged in the baking, retail sale, and wholesale sale of bread and related products. In a pretrial affidavit the Company's president, Erno Klein, admitted that the Company's gross dollar sales volume for the year ending December 31, 1980, was $355,577.41 and that the same figure for the year ending December 31, 1981, was $367,675.04. Klein also admitted that during the calendar year 1981 the Company's wholesale sales were approximately $29,414 and that the same figure for the calendar year 1980 was $28,446.19. I also find from the uncontradicted and credible testimony of Paul Korcos and Jeffrey Olander that during the year ending December 31, 1981, a representative period, the Company in the course and conduct of its business received flour, raisins, shortening, nuts, and other goods valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to the Company's place of business at Southfield, Michigan, from other firms, each of which firms had received these goods and materials from Phillip Olander & Company and Korcos Flour Company, both of which are located in the State of Michigan and each of which firms had received these goods and materials that were delivered to the Company directly from points located outside Michigan.

I find on the basis of the foregoing that, contrary to its position, the Company has been at all times material herein an employer engaged in commerce within the

meaning of Section 2(2), (6), and (7) of the Act. *Culligan Softwater Service*, 149 NLRB 2, 3–4 (1964).

II. THE LABOR ORGANIZATION INVOLVED

The Company admits and I find that Local 78, Bakery, Confectionery and Tobacco Workers, AFL–CIO, the Union, is, and has been at all times material to this case, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Facts*

The Company employed Darryl Spiller from approximately July 1981 until his termination on October 19, 1981, as a bakers' helper.[1] Although the Union represented certain of the Company's employees, Spiller was among those who were not represented by the Union or any other labor organization. However, Spiller became interested in obtaining union membership.

On October 16, Spiller visited the Union's office where he met Levin, a union official and expressed interest in obtaining union membership. Levin asked Spiller why he wished union membership and who had sent him to the union office. Spiller told Levin that he was employed by the Company. Levin advised Spiller that he could not presently respond to Spiller, but would be talking to the Company's management and would contact Spiller thereafter.

On Sunday, October 18, Spiller failed to appear for work as scheduled. Instead, he visited two hospitals because of an undisclosed malady. However, prior to Spiller's scheduled reporting time, his mother, Elizabeth Dove, notified Company President Erno Klein that her son had been ill the previous night and would be "going to the hospital."

On Monday, October 19, Spiller telephoned the Company and advised Erno Klein that he would be reporting for work. Klein told Spiller not to report for work, adding that the Union's business agent, Levin, had advised Klein not to permit Spiller to work. When Spiller asked Klein if he was losing his job because he had gone to the Union about himself, Klein responded, "Yeah." Spiller asked if there was any way he could obtain reinstatement. Again Klein responded that, because of the insistence of the business agent, the Company could not employ Spiller.[2]

[1] All dates occurred in 1981.

[2] My findings of fact regarding Spiller's discharge on October 19 are based upon his testimony and that of his mother, Elizabeth Dove. In resolving the issues of credibility raised by the contrary testimony of company witnesses Erno Klein, Maznu Chowdhury, and Arthur Lee Spiller, I noted Klein's hastily and crudely contrived attempt to repudiate his earlier admission in a pretrial affidavit that it was he who had discharged Spiller, and that the three witnesses gave conflicting accounts of Darryl Spiller's discharge. In light of these conflicts, and Klein's admission as contained in his pretrial affidavit, I have concluded that the testimony of the three Company witnesses regarding the circumstances leading to Spiller's discharge, was unreliable. I also considered my impression that Darryl Spiller and his mother, Elizabeth Dove, were candid witnesses.

B. *Analysis and Conclusions*

In *Operating Engineers Local 18 (Ohio Contractors)*, 204 NLRB 681 (1973), the Board declared:

> When a union prevents an employee from being hired or causes an employee's discharge, it has demonstrated its influence over the employee and its power to affect his livelihood in so dramatic a way that we will infer—or, if you please, adopt a presumption that—the effect of its action is to encourage union membership on the part all employees who have perceived that exercise of power. But the inference may be overcome, or the presumption rebutted, not only when the interference with employment was pursuant to a valid union-security clause, but also in instances where the facts show that the union action was necessary to the effective performance of its function of representing its constituency.

In the instant case, I find that the Union caused the Company to terminate Spiller because he displeased the Union's business agent. Such displeasure arose from Spiller's visit to the Union's office in an effort to learn from that union official the qualifications for obtaining union membership. Here, the interference with Spiller's employment did not arise from "a valid union-security clause" nor from facts showing "that the union action was necessary to the effective performance of its function of representing its constituency." *Operating Engineers Local 18*, supra. I find, therefore, that, by discharging Darryl Spiller in these circumstances, the Company violated Section 8(a)(3) and (1) of the Act. *Chapin & Chapin, Inc.*, 213 NLRB 250, 255 (1974); *Rust Engineering Co.*, 183 NLRB 649, 654 (1970).

I further find that on October 19 the Company violated Section 8(a)(1) of the Act when Erno Klein told Darryl Spiller that he was being discharged because of the Union's insistence and because he had visited the Union's office on October 16. For, by such statement, the Company interfered with Darryl Spiller's rights under Section 7 of the Act[3] to seek membership in a labor organization.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Local 78, Bakery, Confectionary and Tobacco Workers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

[3] Sec. 7 of the Act provides:
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

3. By telling Darryl Spiller that he was being discharged because of the Union's insistence and because he had visited the Union's office, the Company violated Section 8(a)(1) of the Act.

4. By discharging Darryl Spiller because he had visited the Union's office and had sought membership in the Union, and because of the Union's insistence that Spiller be discharged, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that the Company be ordered to cease and desist therefrom, and to take certain affirmative action, set forth below, designed and found necessary to effectuate the policies of the Act.

Having found that the Company unlawfully discharged Darryl Spiller, it will be recommended that he be offered immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges. It is further recommended that the Company be required to make Darryl Spiller whole for any loss of earnings he may have suffered by reason of the discrimination against him by paying to him a sum of money equal to the amount he would have normally earned as wages from October 19, 1981, the date of his discharge, to the date of the Company's offer of reinstatement, less net earnings, with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[4]

I shall also recommend that the Company expunge from its files any reference to Darryl Spiller's discharge on October 19, 1981, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

I shall further recommend that the Company be required to preserve and make available to Board agents, upon request, all pertinent records and data necessary to analyze and determine whatever backpay may be due Darryl Spiller.

[Recommended Order omitted from publication.]

[4] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).